Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

JOHN WENTWORTH EVANS,
Petitioner,
vs.
ALEXANDER WEIR, III, BRUCE R. WEIR,
CAROL J. ASHMAN AND ALEXANDER WEIR, JR.
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal Second Appellate District, Division One

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the due process considerations outlined by this Court in *Ungar v. Sarafite*, 376 U.S. 575 (1963) extend to a civil litigant who seeks a continuance so that counsel can prepare for trial?

2. Does a trial court's denial of a request for continuance, precluding a civil litigant from having prepared counsel at trial, violate that party's constitutionally protected right to a fair trial under the 5th and 14th amendments?

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Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal Second Appellate District, Division One

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Wentworth Evans respectfully prays that a writ of certiorari issue to review the opinion of the California Court of Appeal, Second Appellate Division, District One, entered in the above-captioned proceeding on November 4, 1993, affirming a judgment entered in favor of respondents dated June 17, 1991.

OPINIONS BELOW

The opinion of the Court of Appeal for the State of California, Second Appellate District, District One, is unre-

ported. That opinion is reprinted in the Appendix annexed hereto as Appendix 2.

The judgment of the Los Angeles Superior Court is set forth in the Appendix as Appendix 1.

JURISDICTION

On January 26, 1994 the California Supreme Court denied petitioner's petition for a hearing. See Appendix 3. Jurisdiction to hear this writ of certiorari is thereby conferred in this Court by 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Fifth Amendment in the United States Constitution provides, in part:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . ;

The Fourteenth Amendment of the United States Constitution provides, in part:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ;

STATEMENT OF FACTS

1. Background

Petitioner and Alexander Weir, Jr. ("respondent") first met in the early 1970s when they were both employees of Southern California Edison Company, a large utility company. Petitioner was an in-house attorney whose practice was limited to contract work; respondent was a scientist with a Ph.D in chemical engineering. In 1973 or 1974, respondent requested petitioner's assistance in negotiating a patent

license agreement. Pursuant to the license agreement, respondent received in excess of $700,000 in royalties.

In order to shelter income and minimize estate tax problems for his family, respondent and his wife in 1978 and 1981 established two irrevocable family trusts for the benefit of their children, Alexander Weir III, Bruce Weir and Carol Ashman. Respondent's children were thus named beneficiaries of the family trust; respondent was the settlor; and petitioner, respondent's friend and attorney, was named sole trustee.

On April 28, 1989 the beneficiaries of the Weir Family trust filed an action to remove petitioner as trustee and for an accounting. Following a contested hearing, petitioner was removed as trustee by order of the Los Angeles Superior Court, filed January 10, 1990. Petitioner was further ordered to provide a final accounting on the trust within ninety days, at which time the beneficiaries' request for a surcharge pursuant to the provisions of California Probate Code § 16440 would be considered.

On April 6, 1990, petitioner filed his final accounting. Nine weeks later, the trust beneficiaries filed objections to that accounting. Immediately thereafter, petitioner's attorney substituted out of the matter and petitioner substituted himself as his own counsel.

Following petitioner's commencement of a Chapter 7 petition, the beneficiaries obtained relief from the automatic stay. Trial on the contested accounting and surcharge issues was set for February 11, 1991 in the Los Angeles Superior Court. Following this Court's decision in *Grogan v. Garner*, 498 U.S. 279 (1991), the insurance company which had agreed to represent petitioner in connection with certain adversary actions brought against him in his bankruptcy agreed for the first time to provide petitioner with a defense in the accounting and surcharge action.

On February 5, 1991, petitioner obtained counsel in connection with that proceeding. Two days later, petitioner's new counsel filed an ex-parte application for a ninety day continuance of the trial on the accounting and surcharge issue. In the application, new counsel for petitioner stated that a continuance was necessary so as to permit an adequate accounting to be provided in accordance with the Los Angeles Superior Court rules. See Appendix 4. Counsel also indicated that because of the complexity of the factual issues presented by the surcharge issue, additional time was necessary to permit petitioner's attorneys to learn the factual background of the case as well as to subpoena appropriate witnesses and to prepare necessary direct and cross-examination. Although no opposition to the request for a continuance was filed, the application was denied. The lower court offered no opinion in denying the application. Trial then was ordered to proceed as scheduled for February 11, 1991.

Because of the complex nature of the investments which the Weir family trusts made in the 1980s, petitioner's newly appointed counsel was not in a position to understand the issues involved at the trial and could not direct petitioner's defense. This compelled petitioner, an in-house corporate lawyer with no litigation background, to undertake the task of representing himself in a complex trial in which he had no idea of the procedural and substantive hurdles confronting him.

2. The Nature of Respondents' Investments

The factual complexity of the trial arose from the nature of the family trusts' investments. In an effort to maximize the settlor's desire to increase the trusts' *res*, the trusts made a series of investments through Swiss banks. In an effort to augment the size of the trusts' assets, the trusts borrowed substantial sums of money from Swiss banks. These loans were all denominated in Swiss francs. With the proceeds of

these loans, the trusts purchased blue chip securities largely denominated in U.S. dollars.

In the first half of the 1980's, the steady appreciation of the dollar against the Swiss franc increased the value of the assets held by the trusts. However, subsequent to early 1985, the dollar began a steady decline against the Swiss franc which, in the next few years, caused its value to drop by over half. The effect of this collapse in the value of the dollar greatly imperiled the trusts since the loans which had permitted leveraged investments to be made were denominated in Swiss francs. With the constant appreciation of the franc against the dollar, the value of the Swiss franc denominated debts of the trusts increased dramatically after 1985. By 1989, the combination of the stock market crash of October 1987 and the erosion of the value of the dollar against the Swiss franc had wiped out the asset value of the trusts. This loss of the trusts' *res* promptly led to the commencement of proceedings against petitioner.

3. Course of the Hearing on the Accounting and Surcharge Issues

On February 11 and 13, 1991 a two day trial in connection with the accounting and surcharge occurred. Although petitioner's insurer-appointed counsel had associated himself into the case, petitioner's newly appointed attorney made it clear that because of the complexity of the issues involved and the fact that he had only just been retained, petitioner himself would have to act as his own attorney in the proceedings. Because of his inability to prepare for trial counsel for petitioner was rendered a mere bystander during trial.

Reflecting a complete inability to understand the adversary nature of litigation, petitioner made numerous unprovoked gratuitous admissions, failed to produce witnesses beneficial to his case, proved incapable of cross-examining

respondent and showed a total failure to elicit testimony on direct or cross-examination that was remotely favorable to his position. All of these procedural fiascos, which deprived petitioner of his due process right to a fair trial, occurred by virtue of the trial court's refusal to continue the trial for a brief period of time so that newly appointed counsel could prepare a defense for petitioner.

The reporter's transcript from the trial contains overwhelming evidence of petitioner's inability to operate in the litigation arena and to put on a defense. At the beginning of the hearing, after petitioner's newly appointed counsel explained why he could not personally conduct the trial, the following gratuitous colloquy occurred:

> "THE COURT: Mr. Evans, you were about to tell me something.
>
> MR. EVANS: Your Honor, I am prepared to stipulate that the investments which you have just recited are — would be imprudent in terms of the standard for investing trust funds."

The trial judge then indicated that he had problems regarding the accounting which Petitioner had filed. Petitioner, without any provocation, conceded that he had no idea of how to put together an appropriate accounting.

> "THE COURT: If no one is going to object to that as irrelevant, I will.
>
> MR. EVANS: Well, Your Honor, that's the crux of the whole thing."
>
> "THE COURT: I know what the crux of this is, and I know what alternatives you want the court to go after. I have read the file. I have read the alternative schedule. I know what a schedule looks like.

> "MR. EVANS: I don't know what they look like, and there is no doubt the schedules could be substantially better."

The trial judge found that the critical issue at the trial was whether the settlor of the trusts had directed assets of the trusts to be placed into a leveraged Swiss investment program. Throughout the trial, the trial court specifically directed the petitioner to put on evidence regarding the settlor's intent in this regard. Notwithstanding the court's admonitions, petitioner repeatedly stated that he could not proffer any evidence showing how respondent/settlor had wanted assets of the trusts invested:

> "MR. EVANS: And I can sit here, Your Honor, and lead the witness through each investment and point out exactly what happened in each investment, and I can demonstrate where the money went. I am not able to point to any document that I have in my possession that is, in essence, from Dr. Weir saying, put the money here, period. This whole issue is one of credibility, Your Honor. Although I can tell you where everything went, that's as best I can do."

In an effort to try to show that respondent had required that trust assets be placed into a leveraged Swiss investment program, subpoenas were served on respondent's children, the beneficiaries of the trusts. Respondent's counsel moved to quash those subpoenas on the grounds that the testimony of the beneficiaries was not relevant. The trial court then invited petitioner to explain why the beneficiaries' testimony would be germane:

> "THE COURT: So the beneficiaries are going to say, we don't care what the trustor did, what the trustee did.
>
> MR. EVANS: I don't think they are going to say that, but I think Bruce Weir will indicate he knew exactly where the money was, why it was that Dr. Weir

instructed me to put it there, and that it was all explained to him.

THE COURT: That doesn't get you far unless you are going to say that. Unless you said, in Bruce Weir's presence, I made an unauthorized — I made an investment that is not a proper trust investment, Dr. Weir instructed me to make this investment in unauthorized trust assets, and I did it all at his request and Bruce Weir sat there and said, that's nice, what do you think about the Dodgers this season. I haven't heard the evidence, and maybe that's what happened.

MR. EVANS: I can stipulate, Your Honor, that's not what happened."

Notwithstanding the trial court's concern that testimony of the beneficiaries could only be of marginal relevance to the question of the settlor's direction of trust investments, that court made it clear that it would permit the subpoenaed witnesses to testify until petitioner, consistent with his complete failure to understand the litigation process, stated that the beneficiaries would not provide testimony concerning respondent's desires concerning the investments of the trusts:

"THE COURT: I'm not going to quash the subpoena. It's very, very marginally relevant.

The reason I have trouble ruling on it is because Mr. Evans is so elusive as to what he intends these people will say. I have set forth the groundwork pretty well. You have to have the statement of Dr. Weir that I, Dr. Weir, have been the precipitating force, precipitating power behind these investments, that I am aware that Switzerland accounts are not a proper trust investment, but I want you, Mr. Evans, nonetheless, to invest my money in these accounts. And you have to have Bruce Weir hearing that, acknowledging that. If it

didn't happen, it didn't happen, and we're not going to get very far. But I don't know whether that happened or not. I won't prejudge that until and unless I hear it.

"MR. EVANS: I will admit that didn't happen. If that's the standard, there is really no —

"THE COURT: All right. So I will quash the subpoena as to those witnesses then."

4. The Decision Below

Based upon petitioner's admission that he had caused the trusts to make imprudent investments and that he lacked the ability to introduce evidence showing that respondent had directed him to invest assets of the trusts in speculative leveraged investments whose success was contingent upon the continuation of favorable exchange rates, it is not surprising that the trustee was surcharged. Thus the trial court, on June 17, 1991 entered a judgment after trial surcharging petitioner $404,500.00, together with interest from January 1, 1984 to the date of entry of judgment.

On November 4, 1993 the Court of Appeal of the State of California, Second Appellate District, Division One, in an unpublished opinion, affirmed the judgment of the trial court. A petition to the California Supreme Court was timely filed. On January 26, 1994, the California Supreme Court denied the petition for review.

REASONS FOR GRANTING THE PETITION

The factual presentation demonstrates that Petitioner was denied his rights to due process. At the surcharge hearing, Petitioner was burdened with factual circumstances which made it impossible for a fair hearing to occur.

Petitioner proceeded to the surcharge hearing with unprepared counsel, with an accounting which was absent neces-

sary information and which negatively impacted on his credibility, and with a complete inability to defend himself.

In *Ungar v. Sarafite*, 376 U.S. 575 (1963), this Court articulated upon the due process considerations when a request to continue a trial is denied. In *Ungar*, an attorney charged with contempt for refusing to answer several questions at an earlier trial, requested a continuance of the contempt trial so as to engage counsel to represent him. The trial court, having granted two previous requests for short continuances, denied the request. This Court held that under the circumstances presented, the denial of the motion to continue did not violate the petitioner's right to due process. In so ruling, this Court took account of the fact that the petitioner had been given adequate time "to hire counsel and to prepare a defense to a case in which the evidence was fresh, the witnesses and the evidence readily available, the issues limited and clear cut and the charge revolving around one statement made by Ungar during a recently completed trial." *Id.*

This Court then stated as follows:

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. [citation omitted] Contrarywise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality [citation omitted]. There are no mechanical tests for deciding whether a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request was denied. [Citations omitted]. *Id.*, at 575.

Numerous circuit courts have relied and expanded upon this discussion in *Ungar*. In *United States v. McManaman*, 653 F.2d 458 (10th Cir. 1981), the court reviewed a lower court's denial of a criminal defendant's motion to continue his trial date so as to accommodate the schedule of one of his two trial attorneys. Citing *Ungar*, the court stated that the lower court did not abuse its discretion in denying the request given that the record revealed that the lower court "did not treat defendant's request in a casual manner, as is evidenced by the detailed statement explaining his denial of the continuance." *Id.* at 460. In that regard, the court found that the defendant had an attorney who was ready to proceed to trial and who was fully conversant with the case.

In *United States v. West*, 828 F.2d 1468 (9th Cir. 1987), the court offered the following factors in determining whether a lower court's denial of a request to continue a trial date had been arbitrarily unreasonable and prejudicial to the requesting party. The court stated:

> "To determine whether the denial of a continuance is arbitrary or unreasonable, we looked at several factors, including: The diligence of a party requesting the continuance; the likelihood that the continuance, if granted, would accomplish the purpose underlying the party's expressed need for the continuance; the inconvenience to the opposing party, its witnesses, and the court resulting from the continuance; the need asserted for the continuance and the harm that appellant might suffer as a result of the district court's denial of the continuance. [citations omitted]"

Id. at 1469-1470.

The court then stated that:

> "No single factor is determinative and the weight given to any one may vary depending upon the extent of the appellants showing on the others." *Id.* at 1470.

Although this Court in *Ungar* did not narrow its discussion to the due process rights of criminal defendants, the context presented to the Court in *Ungar* was of a quasi-criminal nature and nearly all of *Ungar*'s progeny focus upon the rights of criminal defendants. In *Anderson v. Sheppard*, 856 F.2d 741 (6th Cir. 1988), however, the court relied heavily upon this Court's discussion in *Ungar* in a matter involving a civil litigant suing for race discrimination. In *Anderson*, two days before the scheduled trial date, plaintiff requested a continuance to permit him to obtain new counsel. This request was necessitated because plaintiff's counsel had suddenly withdrawn from the case. That request was denied. one day before the scheduled trial date, the plaintiff again requested a continuance and in doing so represented to the court that he would be able to secure counsel provided that the new attorney had sixty days to prepare for the trial. The second request was also denied. Recognizing that a civil litigant has a right to be represented by retained counsel and that that right is rooted in Fifth Amendment notions of due process, the court, with direct reference and reliance upon *Ungar*, held that the lower court had infringed on the appellant's due process rights to retain counsel. *Id.* at 749.

The court further stated that since "the right to retain counsel is fundamental to a fair trial, we will not consider whether the error was harmless." *Id.* at 749. The Court did, however, state in a footnote that if it was required to examine the record for reversible error, the record demonstrated time and time again that the error was far from harmless given that the appellant, forced to represent himself, clearly did not know what he was doing. *Id.* at 749, fn.3.

In *United States v. Lustig*, 555 F.2d 737 (9th Cir. 1977), cert denied, 434 U.S. 926, the court held that it could examine the trial record to determine if a party who had requested a trial continuance — so as to permit counsel to be fully prepared — was in any way prejudiced by the denial

of that request. *Id.* at 744-745. In particular, the court in *Lustig* stated that the record should be reviewed to determine if the legal representation which the appellant had been afforded was adequate. *Id.* at 744; see also *United States v. Heine*, 920 F.2d 552, 555 (8th Cir. 1990) (Citing *Ungar, supra*, the court stated that in determining whether a trial court had abused its discretion in denying a motion for a trial continuance, the following factors should be considered: "Whether counsel has sufficient time to prepare for trial; whether counsel's conduct at trial showed that he was well prepared; whether the court's refusal to grant the continuance prejudiced the defendant.")

Petitioner's request for a continuance should have been granted given that his attorney was clearly unprepared, there would have been no prejudice to the opposing side or to the court in continuing the hearing, and the harm experienced by Petitioner in being forced to proceed with the unprepared counsel was substantial and irreparable. *United States v. McManaman, United States v. West, supra.* Petitioner, even as a civil litigant, had a right to counsel. Under the circumstances, he was deprived of that right and, a fortiori, was deprived of the right to a fair hearing. *Anderson v. Sheppard, supra.*

In light of the facts presented, and the case law offered, this court is respectfully requested to specifically extend its discussion in *Ungar* to civil litigants.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX 1

Stamped
Filed June 17, 1991, James H. Dempsey, Clerk
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CASE NO. P 733892

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In the Matter of
THE ALEXANDER WEIR, JR. FAMILY TRUSTS,
ALEXANDER WEIR III; BRUCE R. WEIR,
AND CAROL J. ASHMAN,
Petitioners

vs.

JOHN WENTWORTH EVANS,
Respondent.

JUDGEMENT AFTER TRIAL
TRIAL DATE: February 11 & 13, 1991
DEPARTMENT: 11

This cause came on regularly for trial on February 11 and 13, 1991, in Department 11, of the above-entitled Court, the Honorable Edward M. Ross, Judge, Presiding. Petitioners Alexander Weir III, Bruce R. Weir and Carol J. Ashman, appeared by their attorney Gregory J. Sherwin of the law firm of Fields, Fehn & Sherwin. Respondent John Wentworth Evans appeared in pro per and in association

with John C. Doyle of the law firm of Hosp, Granieri & Cairns. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The request of respondent John Wentworth Evans, as trustee of the Weir Family Trusts Nos. 1 and 2, to approve his full and final accounting, dated April 5, 1990, is denied.

2. The request of petitioners to surcharge respondent John Wentworth Evans for his breaches of fiduciary duty, as trustee of the Weir Family Trusts, is granted and respondent John Wentworth Evans is ordered to pay to the Weir Family Trusts Nos. 1 and 2, the sum of $404,500.00 together with interest on that sum, from January 1, 1984, to date of entry of judgement.

3. The request of respondent John Wentworth Evans for allowance of trustee's fees and expenses is denied, the Court finding that respondent's actions were not for the benefit of the trusts.

4. That Warren C. Phillips is appointed trustee of the Weir Family Trusts Nos. 1 and 2, succeeding respondent John Wentworth Evans.

5. That Warren C. Phillips is vested with all the powers that were vested in respondent John Wentworth Evans, as trustee under the written declarations of trust of Alexander Weir, Jr. and Florence Weir and must execute the trusts according to the terms of the trust instruments. The beneficiaries of the trusts having waived the requirement of a bond, Warren C. Phillips shall serve as trustee of the trusts, without giving a bond for his performance.

6. That respondent John Wentworth Evans shall pay over, transfer and deliver the assets of the Weir Family Trusts in his possession to Warren C. Phillips.

7. That petitioners shall have and recover their costs of this proceeding from respondent John Wentworth Evans.

DATED: June 17, 1991.

EDWARD M. ROSS
HONORABLE EDWARD M. ROSS
Judge of the Superior Court

SUBMITTED BY:

FIELDS, FEHN & SHERWIN

By GREGORY J. SHERWIN
GREGORY J. SHERWIN
Attorneys for Petitioners

APPENDIX 2

Stamped
Court of Appeal Second District
Filed November 4, 1993, Joseph A. Lane, Clerk
G. MERCIER, DEPUTY CLERK

NOT TO BE PUBLISHED

B060717
(Super.Ct.No. P733892)

IN THE COURT OF APPEAL
OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

ALEXANDER WEIR III ET AL.,
Plaintiffs and Respondents,
v.
JOHN WENTWORTH EVANS,
Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Edward M. Ross, Judge. Affirmed.

Hosp, Granieri & Cairns, John C. Doyle, Mark E. Benson, Cairns, Doyle, Lans, Nicholas & Soni, and John C. Doyle for Defendant and Appellant.

Fields, Fehn & Sherwin, H. Thomas Fehn, and Gregory J. Sherwin for Plaintiff and Respondent.

John Evans appeals from the judgment entered following a bifurcated court trial which resulted in his being removed as trustee of the Weir Family Trusts and surcharged for breach of fiduciary duty. We affirm.

BACKGROUND

In 1978 and 1981, Alexander Weir, Jr., and his wife, Florence Weir, established irrevocable family trusts for the benefit of their children, Alexander Weir III, Bruce Weir, and Carol Ashman.[1] The trusts named Evans, Weir's long-time friend and attorney, as sole trustee.

On April 28, 1989, the beneficiaries filed a petition to remove Evans as trustee and for an accounting. Following a contested hearing, Evans was removed as trustee by order filed January 10, 1990. He was further ordered to provide a final accounting on the trusts within 90 days, at which time the beneficiaries' request for a surcharge would be considered.

On April 6, 1990, Evans filed his final accounting. The following June 11, the beneficiaries filed a document objecting to the accounting. Three days later, Evans's attorney substituted out of the matter and Evans substituted himself in propria persona. By order dated September 20, 1990, the beneficiaries received relief from an automatic stay which resulted from Evans having filed for personal bankruptcy.[2] After several continuances, trial on the contested accounting was set for February 11, 1991.

On February 5, 1991, counsel substituted in to represent Evans. On February 7, Evans, through new counsel, filed an ex parte request for a 90-day continuance of the trial. The request was denied.

---

[1]Settlors Alexander Weir, Jr., and Florence Weir will be referred to collectively in this opinion as "Weir"; their children will be referred to as "the beneficiaries."

[2]The record does not reveal when Evans filed for bankruptcy.

Trial was conducted on February 11 and 13, 1991. The bulk of the evidence involved Evans's use of trust assets to purchase Eurobonds. From the record, it appears that the transactions consisted of the following steps:

Weir loaned, interest free, approximately $400,000 to one of the trusts. That trust, in turn, loaned these funds to Evans in his personal capacity. Evans then placed the funds in a personal account, managed by a Swiss investment advisor, through which the Eurobonds were purchased.[3] The interest on the bonds was to be paid to, and retained by, the trust. However, due to currency fluctuations, Eurobonds became worthless as an investment.

Evans conceded that Eurobonds were highly speculative, and that their purchase "would be imprudent in terms of the standard for investing trust funds."[4] However, he sought to defend himself on grounds that he had been instructed by Weir to invest in the bonds,[5] and that the bonds had been purchased with funds which were not actually part of the trust.

The trial court ruled in favor of the beneficiaries, surcharging Evans $404,500 for breach of fiduciary duty.

ISSUES

Evans contends that the trial court improperly (1) denied his request to continue trial; (2) refused to permit the filing of an amended accounting; and (3) restricted the scope of evidence he was allowed to present at trial.

---

[3]Evans also placed other investors' funds in this account.

[4]The trust instruments specifically required that the trusts undertake only such investment "that men of prudence, discretion, and intelligence acquire for their own account."

[5]Weir denied that he instructed Evans to purchase the bonds, testifying that the investment was Evans's idea.

DISCUSSION

1. Request to Continue Trial

In a declaration in support of Evans's ex parte request for a continuance, which was filed four days before trial, Attorney John Sullivan stated that his firm had been representing Evans since December 1991 in bankruptcy litigation regarding the dischargeability of debts to, inter alia, Weir and the beneficiaries. Such representation had been provided through an insurance carrier, which provided coverage to an employee group to which Evans belonged. On January 31, 1991, bankruptcy counsel for Weir and the beneficiaries informed Sullivan of the case of *Grogan et al. v. Garner* (1991) 498 U.S. 279, which had been filed the previous January 15.[6] Thereafter, the insurance carrier accepted Evans' tender of his defense in the instant litagation, and insurance counsel substituted in to represent Evans.

After denial of the requested continuance, Evans associated as cocounsel with insurance defense counsel for the purpose of trial. As the trial started, Evans told the court that he was "prepared today to go forward." He then proceeded to represent himself at trial.

Evans contends that the trial court committed prejudicial error in refusing to continue the matter so that new counsel could adequately prepare the case. We disagree.

"In ruling on a motion for a continuance, the court considers all matters relevant to a proper determination of the motion . . . " (Standards of Judicial Administration, § 9; see also Cal. Rules of Court, rule 375(a).) The court

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[6] *Grogan* resolved a split among the circuits and held that fraud would prevent a debt from being discharged in bankruptcy if proved by a preponderance, rather than clear and convincing evidence. Thus, a state court fraud judgment based on the preponderance standard would be entitled to collateral estoppel effect in the bankruptcy court. (*Id.* at pp. 281-283.)

exercises great discretion in ruling on motion for a continunace, and that exercise of discretion will be overturned only upon a showing of manifest abuse. (*In re Marriage of Johnson* (1982) 134 Cal.App.3d 148, 154-155; see 7 Witkins, Cal. Procedure (3d ed. 1985) Trial, §§ 7-9, pp. 24-26.)

Evan's personal bankruptcy had already delayed resolution of the beneficiaries' action. As an attorney, Evans was capable of continuing to represent himself. His insurance carrier's apparent change of heart following Supreme Court resolution of an unsettled legal issue did not provide any basis upon which to require yet another delay in the proceedings.

Moreover, even if a continuance should have been granted, we may not provide Evans with any relief on appeal unless he can demonstrate that denial of the continuance resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069). Here, despite the fact that Evans has been continuously represented by the same counsel since the trial on the accounting, his briefs on appeal, filed more than two years after that representation began, fail to suggest how he might have been prejudiced by being required to begin trial on February 11, 1991. Accordingly, Evans's claim must fail.

2. Amended Accounting

In both his request for a continuance and at the conclusion of trial, Evans asked for leave to amend the final accounting he had filed on April 6, 1990. Evans asserted that, because of lack of funds and expertise, the accounting he had submitted may have been inaccurate. The trial court, which had characterized (somewhat colorfully) Evans's accounting as a "piece of trash," denied Evans's requests. The court determined the damages it awarded to the benefi-

ciaries based on the final accounting filed by Evans and on the evidence adduced at trial.

On appeal, we reject Evans's contention that the trial court committed a prejudicial abuse of discretion in denying leave to file a new accounting. As with the issue of a continuance, Evans has failed to suggest how the ability to amend the accounting would have inured to his benefit. He is not entitled to relief on appeal.

3. Scope of Evidence

In discussions with counsel during trial on the accounting, the court consistently defined the relevant issue being tried as whether Evans had been instructed to invest in Eurobonds on behalf of the trust, or whether the investment was Evans' idea. Consistent with this definition, the court refused to permit Evans to present evidence on collateral issues. We find no error.

Evans did not provide any authority to the trial court, nor has he provided any to this court, which would support the notion that money loaned to a trust for the purpose of producing interest income is not governed by the principles of trust administration embodied in Probate Code sections 16000 et sequitur.[7] Indeed, at the hearing which resulted in his being removed as trustee, Evans admitted that the loans from Weir for the purchase of Eurobonds were an "[a]sset of the trust." Accordingly, Evans was liable to the beneficiaries for the loss of the proceeds of the loans. (Prob. Code, § 16440, subd. (a)(1).)

Evans asserts that he was improperly denied permission to introduce evidence of his "good faith" in purchasing the

---

[7]Evans's reliance on Probate Code sections 16227 (management of trust property) and 16440 (measure of liability for breach of trust assessed in relation to the trust estate) is misplaced. These statutes merely recognize the existence of trust assets; they do not purport to define which assets are or are not part of a trust.

Eurobonds. This assertion is based upon a provision in the trust documents relieving Evans of liability for transactions undertaken in reliance on the advice of "professional investment counsel." In making this assertion, Evans also relies on Probate Code section 16461, subdivision (b)(1), which provides that a trustee may not be relieved of liability if the trust has been breached "intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary." However, Evans never asserted the defense of "good faith" in the trial court; consequently, there is no record on which we may review it. Moreover, based on Evans's admission at the hearing on his removal as trustee that he never told the Swiss investment advisor that the account included trust assets, such a defense could not have succeeded.

During the course of trial, the court made clear its willingness to hear all evidence relevant to Evans's consent defense. However, the only evidence that Evans presented on this topic was that *Weir* directed the investments in Eurobonds. Because the limitation of liability of probate Code section 16463 is applicable only where consent is given by the *beneficiaries*, it is apparent that Evans actually had no defense to the charge that he breached the trusts by engaging in admittedly speculative investments.

In our review of the appellate record, we have encountered no circumstance in which the trial court precluded Evans from presenting evidence which would have provided a valid defense to the contested accounting. Accordingly, we reject his contention that such limitation prejudiced his case.[8]

---

[8]Based on this conclusion, we need not determine whether a memorandum opinion of the bankruptcy court in an unrelated matter between the parties is a proper subject of judicial notice in this case.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MASTERSON, J.

We concur:

SPENCER, P. J.
VOGEL (MIRIAM A.), J.

APPENDIX 3

SUPREME COURT
FILED
JANUARY 26, 1994

Robert Wandruff, Clerk
Deputy

H. Cruz, Deputy

No. B060717 S036741

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

Second Appellate District, Division One,

IN BANK

ALEXANDER WEIR III ET AL., *Respondents*

v.

JOHN WENTWORTH EVANS, *Appellant*

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX 4

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Attorneys for Respondent
JOHN WENTWORTH EVANS

Stamped Filed February 7, 1991
Frank Zolin, County Clerk
By C. Simmers, Deputy
DENIED

CASE NO: P 733 892

SUPERIOR COURT
OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In the Matter of
THE ALEXANDER WEIR, JR. FAMILY TRUSTS,
ALEXANDER WEIR III; BRUCE R. WEIR AND
CAROL J. ASHMAN,
Petitioners

VS.

JOHN WENTWORTH EVANS,
Respondent.

EX PARTE APPLICATION FOR AN ORDER CONTINUING THE TRIAL OR ALTERNATIVELY FOR AN ORDER SHORTENING TIME FOR HEARING ON A MOTION TO CONTINUE THE TRIAL; MEMORANDUM OF POINTS AND

AUTHORITIES; DECLARATION OF JOHN A. SULLIVAN IN SUPPORT THEREOF; PROPOSED ORDER

DATE: February 7, 1991
TIME: 1:30 P.M.
DEPT: "11"

TRIAL DATE: February 11, 1991

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Respondent JOHN WENTWORTH EVANS hereby applies ex parte for an order continuing the trial or in the alternative for an order shortening time for a hearing on a Motion to Continue the Trial. Good cause exists for this order, as set forth in the accompanying Declaration of John A. Sullivan. Respondents also submits that the interests of justice and fairness will be substantially furthered by granting the brief continuance requested, but substantially hindered if this continuance is refused. In particular, if the financial records can be reviewed by a Certified Public Accountant and a full accounting submitted, the issues will be narrowed considerably.

This Application is based on this Notice, the Declaration of John A. Sullivan, indicating that all parties were properly notified of the date, time, department and subject matter of this ex parte proceeding, on the Memorandum of Points and Authorities in support of this Application, upon the pleadings, papers and records on file herein, and on such oral and documentary evidence as may be submitted at the hearing of this Application.

DATED: February 7, 1991

HOSP, GRANIERI & CAIRNS
A LAW CORPORATION

By JOHN A. SULLIVAN
JOHN A SULLIVAN
Attorney for Respondent
JOHN WENTWORTH EVANS

prevailed in the probate action, the doctrine of collateral estoppel would apply to the bankruptcy action.

5. Based upon Mr. Sherwin's representation and a review of the *Grogan* case, the defense of the probate matter was tendered to the insurance carrier. The insurance carrier has accepted Evans' tender and on February 5, 1991, our firm substituted in as Evans' counsel in the probate action.

6. One of the first actions taken was to attempt to obtain permission from the insurance carrier to have a Certified Public Accountant review all of the trust financial documents for the purpose of preparing a full and complete accounting. While the carrier has not yet given full approval for such work, the carrier has agreed to have our firm contact a Certified Public Accountant and obtain an engagement letter outlining the scope of the review of the documents and the costs involved therein. It is my belief that such a review will greatly narrow the issues that have to be resolved by the trial court and will significantly serve the interests of justice. An accountant has been contacted and the letter of engagement will be prepared in the next few days.

7. As new counsel in this matter, I believe that the interests of my client will be severely and irreparably harmed if this matter goes to trial on February 11, 1991. I have not had adequate time to review all of the pleadings, trust financial documents, correspondence and other material. Nor have I been able to obtain a transcript of the prior court hearings in order to evaluate the need for additional testimony and evidence.

8. I am further informed that Mr. H.P. Hambrick will be out of the country on February 11 and 12, 1991 and I believe that his testimony will be critical to the position of the respondent.

9. Two sessions of the deposition of H.P. Hambrick have been taken in the bankruptcy case involving the Weir Trusts but that deposition was not completed and I have only been permitted to ask three or four questions, whereas counsel for petitioners herein has been able to ask question for two entire days. Based upon comments made to me by Mr. Sherwin, I believe that he will attempt to use evidence obtained in those two sessions of depositions against respondent and, since my scope of inquiry has been limited, I will not be able to adequately rebut those points raised by the petitioners.

10. I believe that a continuance of ninety (90) days will be required in order to permit a complete review of all the financial records by a Certified Public Accountant and to permit this firm to obtain the manuscripts of the prior hearings and to completely familiarize ourselves with the case.

11. I am requesting a brief continuance of ninety (90) days, so that I can be fully and properly prepared to present this case for trial. I respectfully submit that this brief continuance will not operate to prejudice any of the other litigants. I can also assure this court that there will be no further requests for continuances on behalf of the respondent.

12. At 10:44 a.m. on February 6, 1991, I called Mr. Sherwin's office and asked for him. I was told by Sonia Benjamin that he was in a meeting. I have her the following message. I was calling to give notice of an Ex Parte Application in the *Weir v. Evans* probate case for an order continuing the trial or alternatively, for an order shortening time for hearing on a Motion to Continue the Trial. The hearing on the Application will be held February 7, 1991 at 1:30 p.m. in Department "11" of the Los Angeles Superior Court at 111 N. Hill Street, Los Angeles, California. At 10:50 a.m. on February 6, 1991, I called Robert Orgel's

office. He too was unavailable and I left an identical message with Susan Scott. Lastly, at 10:54 a.m. on February 6, 1991, I called Curtis Danning's office and left an identical message with Beverly Lew.

13. In conclusion, I respectfully request this court not to permit respondent's interests to be threatened, or jeopardized. The interests of fairness and justice should prevail, especially where such a minimal continuance is at issue.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed this 7th day of February, 1991 at Pasadena, California.

JOHN A. SULLIVAN

JOHN A. SULLIVAN
Declarant

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION

I
A CONTINUANCE OF TRIAL SHOULD BE GRANTED ON AN AFFIRMATIVE SHOWING OF GOOD CAUSE.

In ruling on requests for continuances, trial courts are directed to consider *California Rules of Court*, Rule 375(a), and Section 9 of the *Standards of Judicial Administration*. These two authorities provide that a continuance should be granted on an affirmative showing of good cause.

In detailing the relevant matters, trial courts should consider in ruling on requests for continuances, Section 9 of the *Standards of Judicial Administration*, at paragraph 4, directs trial courts to consider the diligence of counsel; the nature of any previous continuances, extensions, or other delays; the condition of the court's calendar, the proximity of the trial date; and any other fact or circumstance relevant to a fair determination of the motion.

While requests for continuances are subject to the discretion of the trial judge, that discretion must be exercised with due regard to all interests involved, and the refusal of a continuance which has the practical effect of denying the applicant a fair hearing is deemed reversible error. 7 *Witkin, California Procedure*, 3d Edition, "Trial", § 10, page 26-27.

The court in *Broadwell vs. Ryerson*, (1948) 85 Cal.App.2d. 352, 192, P.2d. 797, went even farther:

> "Where the enjoinment of substantial rights of a litigant conflicts with the mere convenience of the court, the rights should not be forfeited in order that the court not be discomoded." Id. at 357.

According to the authorities cited and discussed herein, the facts and circumstances detailed in the Declaration of

John A. Sullivan support a finding of good cause in support of the brief continuance requested, and certainly suggest that this court's discretion should be exercised in favor of a full and fair litigation on the merits rather than any less meaningful alternative.

II
THERE IS AMPLE AUTHORITY TO UPHOLD THIS COURT'S ORDER THAT THE FACTS AND CIRCUMSTANCES AT ISSUE IN THIS CASE JUSTIFY GRANTING THE BRIEF CONTINUANCE REQUESTED.

There is ample substantially analogous judicial precedent in California upholding a finding of good cause for granting the continuance requested.

For example, in *Carli vs. Superior Court* (1984) 152 Cal.App.3d. 1095, 199 Cal.Rptr. 583, a tape containing answers to requests for admission under the old *Code of Civil Procedure* was misplaced following an attorney's departure from the petitioner's law firm. After detailing the facts surrounding the oversight, and the prejudicial effect thereof, namely that requests for admissions were deemed admitted, the *Carli* court issued a peremptory writ of mandate directing the Superior Court to grant the petitioner relief, and commented as follows:

> "Here, the petitioner's law firm lost one of its three attorneys, an event of significance in a firm so small. *Matters must be continued*; files must be reviewed; nervous clients must be placated." Id at 1099. (Emphasis added.)

In *Pearson vs. Continental Airlines* (1970) 11 Cal.App.3d. 613, 89 Cal.Rptr. 853, a case involving a default and request for relief therefrom, the Court of Appeal cited and discussed the facts and circumstances which had re-

sulted in the default. An employee had failed to follow company procedure, failed to communicate essential information regarding a summons and complaint, and default had been entered. In upholding the trial court's order granting relief from that predicament, the Court held that those facts and circumstances constituted good cause for granting the relief requested. The same rule should apply here.

And finally, the court in *Nicholson vs. Rose* (1980) 106 Cal.App.3d. 457, Cal.Rptr. 156 provided some valuable insight:

> "*California Code of Civil Procedure* § 473 allows a court, upon such terms as may be just, to relieve a party from a judgment taken against him through mistake, inadvertence, surprise, or excusable neglect. Defendants claim their failure to appear for trial was due to excusable neglect of their counsel. Specifically, they assert that as a result of counsel's defective intra-office communication, the dates for the mandatory settlement conference and for the trial were inadvertently left off counsel's office calendar. But it appears at bench that defendants pursued a course of dilatory tactics and spurious objection throughout the litigation. Further, they themselves set the date for trial. The disposition of a motion to vacate a judgment under *California Code of Civil Procedure* §473 lies within the discretion of the trial court, and each such disposition depends upon the particular facts of the cause. (Citation)." Id. at 460-461.

The conduct of the defendants in *Nicholson* was characterized as spurious and dilatory; here, the conduct of the respondent has been both diligent and in good faith. Due to a lack of funds which led to him filing bankruptcy, Mr. Evans has most recently been unable to afford counsel and has appeared pro per. In addition, he has not been able

to retain a Certified Public Accountant for an accounting. The former condition has now been cured and it is hoped that the latter will be also. In *Rankin v. Curtis* (1986) 1983 Cal.App.3d 939, 228 Cal. Rprtr. 753 which dealt with a trial court's refusal to grant a continuance for a hearing on a Motion for Good Faith Settlement and recently retained counsel, the appellate court held it was an abuse of discretion not to grant a continuance when refusal results in denial of a fair hearing. That is precisely the situation herein.

In conclusion, these authorities all suggest that when a litigant is placed at a disadvantage through an unforeseen set of circumstances, trial courts should grant the litigant relief from the prejudicial consequences thereof. Indeed, that is the legislative intent behind the enactment of *California Code of Civil Procedure* §473.

III
THERE WILL BE NO PREJUDICE TO ANY OF THE LITIGANTS IF THIS BRIEF CONTINUANCE IS GRANTED.

Respondent is requesting only a ninety-day continuance. There will be no adverse consequences to the litigants if that brief continuance is granted.

Moreover, that is not a case which has been litigated at high speed. There has been no demonstrable urgency or other circumstances put forth by any of the litigants in support of having this matter finally resolved at once.

While respondent certainly agrees that the petitioners are entitled to proceed to trial within the confines of this court's system, respondent respectfully submits that they are not entitled to do so at the expense of the other litigants. In light of the circumstances detailed in the Declaration of John A. Sullivan, and the authorities set forth above, respondent requests that its interests now be considered in light of the

absence of any prejudicial effect to petitioners if this brief continuance is granted. Given the absence of any prejudicial effect, there does not appear to be any good cause for not granting this motion.

CONCLUSION

Wherefore, based on all of the above, respondent respectfully requests that this court grant this Application in its entirety, and issue an order continuing the trial for at least ninety (90) days.

DATED: February 7, 1991

HOSP, GRANIERI & CAIRNS
A Law Corporation

By JOHN A. SULLIVAN
JOHN A. SULLIVAN
Attorneys for Respondent
JOHN WENTWORTH EVANS

Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

No. 93-1720

In The

Supreme Court of the United States

October Term, 1993

JOHN WENTWORTH EVANS,

Petitioner,

vs.

ALEXANDER WEIR, III, BRUCE R. WEIR, CAROL J. ASHMAN AND ALEXANDER WEIR, JR.,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

RESPONDENTS' BRIEF IN OPPOSITION

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No. 93-1720

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JOHN WENTWORTH EVANS,

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ALEXANDER WEIR, III, BRUCE R. WEIR, CAROL J. ASHMAN AND ALEXANDER WEIR, JR.

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division One

RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Justice delayed is justice denied. This petition for a writ was filed almost five years from the day when Respondents commenced their action to remove Petitioner John W. Evans ("Evans") as trustee of the family trusts of which they are beneficiaries. The petition was filed on the last day possible for

this Court to retain jurisdiction. Supreme Court Rule 13.1. The petition represents one last dilatory attempt to prevent Respondents from recovering the money that Petitioner misappropriated as sole trustee of the family trusts.

Petitioner contends he was deprived of due process by the lower court's refusal to grant him a continuance of the trial. Respondent was given a full opportunity to present his defense through counsel of his choice. If counsel was unprepared, there was no showing in the trial court that the fault rested with anyone but Petitioner. California provides ample procedural safeguards for Petitioner to have presented additional evidence to the trial court. Petitioner failed to take advantage of those procedures and cannot now complain of any constitutional error.

COUNTERSTATEMENT OF FACTS

On April 28, 1989, Respondents Alexander Weir, III, Bruce R. Weir and Carol J. Ashman filed their action to remove Petitioner Evans as trustee of the Weir family trusts and for an accounting.[1] Evans filed his response to Respondents' petition, through counsel.

On December 5 and 6, 1989, a hearing was held on Respondents' petition. At the conclusion of the hearing, Evans was removed as trustee of the trusts and the court ordered him to file a trust accounting within ninety days. The matter was then continued to March 15, 1990 for a further hearing on Evans' accounting.

On March 15, 1990, Evans appeared through counsel. After confirming that Evans had not filed the court-ordered accounting,

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1. Alexander Weir, Jr., the father of the trial court petitioners, was the settlor of the trusts but was not a party to the action. He has been named improperly as a Respondent to this Petition.

the court stated that the accounting "should have been filed March 6th." Evans' attorney indicated that an accounting had been prepared but it was not in the proper format. The court responded: "That's not the way you do a court accounting. You might walk across to [room] 258 and talk to one of the probate attorneys and get them to show you how a court accounting looks." The proceedings were then continued to May 3, 1990.

On April 6, 1990, while still represented by counsel, Evans filed his accounting. After further continuances, a hearing was scheduled for June 14, 1990. At 4:22 p.m., on the day before the hearing, Petitioner filed a Chapter 7 bankruptcy petition through retained counsel.

Respondents subsequently filed in the bankruptcy court a complaint to determine non-dischargeability of the debt that was the subject of the state court proceedings. Respondents obtained relief from the automatic bankruptcy stay order to pursue the claim in the state court.

On November 5, 1990, the Superior Court rescheduled the hearing on the trust accounting for February 11 and 12, 1991.

In December 1990, Petitioner's current counsel were retained to represent him in the bankruptcy litigation commenced by Respondents.[2] (Petitioner's Appendix 4, p. 15a). The factual issues in the bankruptcy complaint and the state court proceeding are identical. The legal issues are similar. Petitioner's counsel had more than a month to prepare for a hearing that lasted less than two half-days.

---

2. "Respondent" Alexander Weir, Jr. was also a plaintiff in that action on a separate claim for relief. The bankruptcy court severed the two claims and has entered a non-dischargeable judgment in favor of Alexander Weir, Jr. against Petitioner Evans in the amount of $511,351.93 for Evans' intentional fraud. That judgment is currently on appeal to the district court.

On February 7, 1991, Petitioner moved the trial court, *ex parte*, for a 90 day continuance of the trial and submitted a written application in support of his request. Respondents' counsel personally appeared to oppose any continuance. Petitioner's application was denied.

On February 11, 1991, Petitioner (an attorney for more than 15 years) appeared with his co-counsel, Mr. Doyle, and announced that he was prepared to go forward with the hearing. Petitioner, with assistance from Mr. Doyle, examined Alexander Weir, Jr. as a witness, and also testified himself. After less than half a day of testimony, the matter was continued to the afternoon of February 13th. Petitioner and his retained counsel, therefore, had a further day and a half to prepare for the examination of witnesses. At the resumed hearing, Mr. Doyle was allowed to recall the witnesses who had already testified, and he examined them fully.

At the conclusion of the hearing, the court announced its tentative decision. However, a formal judgment was not entered until four months later, on June 17, 1991 (*see* Petitioner's Appendix 1).

Under California's law, a party has until 15 days after notice of entry of a judgment against him within which to make a motion for a new trial based upon "accident or surprise, which ordinary prudence could not have guarded against," or "newly discovered evidence material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." California Code of Civil Procedure, Section 657. Petitioner made no such motion in the trial court.

Petitioner has not, either in his briefs to the Court of Appeal below, his petition for review to the California Supreme Court, nor in his petition to this Court, set forth what material evidence he would have presented (either in the way of witnesses or a further

accounting) that could have changed the result in this case. Notwithstanding Petitioner's contention that the issues were complex, the underlying facts were simple and not seriously disputed. Petitioner received more than $400,000 as trustee of two trusts established for the benefit of Respondents. Until the underlying action was commenced, he had never provided any accounting for the funds he held. When finally compelled to do so, he confessed that all of the money had been lost in a speculative leveraged investment which, by his own admission, was not an appropriate trust investment.

REASONS FOR DENYING THE WRIT

Petitioner has not demonstrated the existence of any special and important reasons justifying review of the Court of Appeal decision. Supreme Court Rule 10.1.

I.

THE COURT OF APPEAL'S DECISION CREATES NO CONFLICT WITH ANY OTHER COURT OR DECISION.

The California Court of Appeal's decision does not create any conflict with any decision of this Court or with the highest court of any other state, and Petitioner does not claim otherwise. As an unpublished decision, the Court of Appeal's opinion cannot be cited as precedent on any issue in any court.

II.

THE DECISION BELOW RESTS UPON THE TRIAL COURT'S PROPER EXERCISE OF ITS POWER AND DISCRETION AND FALLS WELL WITHIN THE BOUNDS OF WELL-ESTABLISHED DUE PROCESS LIMITS. GRANT OF THE PETITION WILL NOT BE OF ANY PRECEDENTIAL VALUE TO FUTURE LITIGANTS.

The trial court's refusal to grant Petitioner a continuance was based upon the specific facts presented to it, and was within the proper exercise of its power and discretion. Petitioner has not demonstrated that the court's ruling was so arbitrary as to deny Petitioner procedural due process.

III.

THE QUESTIONS PRESENTED IN THE PETITION WERE NOT PRESENTED BELOW.

Neither of the questions presented in the petition were raised in the Court of Appeal. Petitioner has not stated any reason why he should be allowed to raise them now.

IV.

ASSUMING, *ARGUENDO*, THAT THE PRINCIPLES OF *UNGAR V. SARAFITE* APPLY TO CIVIL LITIGANTS, PETITIONER HAS NOT DEMONSTRATED THAT HIS DUE PROCESS RIGHTS WERE VIOLATED.

If the due process considerations outlined by this Court in *Ungar v. Sarafite*, 376 U.S. 575, 84 S. Ct. 841 (1963) extend to civil litigants, Petitioner has not demonstrated that he would benefit by their application to this case. In *Ungar*, this Court, after noting that

the "matter of a continuance is traditionally within the discretion of the trial court," stated:

> There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Ibid., 376 U.S. at 589.

Here, Petitioner was given more than three months' notice of the hearing for which he requested a continuance. At the time he requested the continuance, the action had been pending for almost two years and much of the delay had been caused by Petitioner's dilatory tactics. Petitioner was represented by retained counsel, during all critical phases of the pre-trial proceedings, and he was, himself, a practicing attorney. His "newly-retained" counsel (provided by his insurance carrier) had been representing him for at least two months in parallel litigation in bankruptcy court. Petitioner's application for a continuance was silent on the subject of Petitioner's prior efforts to retain counsel or his efforts to secure representation through his insurance carrier. The reasons for the continuance, as expressed in Petitioner's application, were nothing more than general conclusions of his counsel, made without any factual foundation. The trial itself lasted less than two half-days, with a recess of a day and a half between sessions. Petitioner's counsel fully participated in the hearing. Finally, before the trial court entered its judgment against him, Petitioner had a period of at least four months within which to produce any additional evidence he was unable to procure because the continuance was denied. Under all these circumstances, this Court, giving due deference to the trial court's ruling, cannot say that Petitioner was deprived of due process of law.

V.

THE DECISION BELOW IS CORRECT.

The decision below is entirely correct. Petitioner received more than $400,000 as sole trustee of a family trust that he, as an attorney, prepared on behalf of Respondents' parents. When called upon to account for the assets in his care, Petitioner was only able to produce less than $2,000. He admitted that the he had placed the remaining cash in speculative investments that were not authorized by the trust instrument. The Court of Appeal found that none of the issues Petitioner attempted to inject into the trial court proceedings provided any legal excuse for his gross breaches of fiduciary duty, and the trial court's judgment was fully supported by the evidence. Petitioner's failure, in any of his filings, to articulate how a trial continuance would have affected the result confirms that the decision against him was correct.

CONCLUSION

The bankruptcy court hearing Respondents' non-dischargeability complaint against Petitioner is awaiting this Court's decision on the petition before allowing Respondents to proceed with that action. For the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari be summarily denied.

Respectfully submitted,

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